Immunity from Seizure for Cultural Objects on Loan
Museum of New Zealand Te Papa Tongarewa response

This submission is on behalf of the Museum of New Zealand Te Papa Tongarewa (Te Papa). Our main interest with regard to immunity from seizure is in importing touring exhibitions for display at Te Papa for public benefit. Te Papa also facilitates through relationships and advice the potential loan of taonga to other museums and iwi in New Zealand. We have had a number of issues where we were not able to borrow items or exhibitions due to the lack of legislation, and foresee this becoming increasingly difficult as other countries adopt Immunity from Seizure (IFS) legislation.

Should New Zealand introduce immunity from seizure (IFS) legislation?

Q1: Should New Zealand enact legislation to provide immunity from seizure for cultural objects on loan to New Zealand? Why, or why not?

If possible, please provide examples or evidence of problems caused by the absence of IFS legislation in New Zealand or, alternatively, any problems you anticipate might be caused by such legislation.

Yes, Te Papa supports New Zealand enacting Immunity from Seizure legislation.

Ethics

This support does not deny the cultural, moral and ethical imperatives for the return of wrongfully acquired cultural property. This legislation should be in alignment and informed by the ICOM Code of Ethics and international law such as the UNIDROIT and UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict. Te Papa notes that if cultural objects are immune from seizure this does not mean that it would be impossible to initiate legal proceedings with regard to these objects, but simply postpones the ability to do so. Legitimate cases could still be brought, but items could not be seized while they are on display in New Zealand.

Reasons for legislation

There have been some high-profile cases overseas of objects on loan being subject to legal claims, based on disputed ownership or other grounds. As a result, lenders are increasingly asking for protection against legal claims on objects they lend. A growing number of jurisdictions have enacted or are considering IFS legislation, with the result that it is becoming standard practice to request IFS when making loans.

At least ten countries now have IFS legislation, including our major international touring partners such as Europe, and the United Kingdom. Australia, a key touring exhibition partner, is considering introducing legislation. As Te Papa has been advising for some time, bringing in immunity from seizure legislation would bring New Zealand into line with countries we often enter into borrowing agreements with.

New Zealand institutions currently try to meet these concerns by obtaining ‘letters of comfort’ from the Government or including special IFS provisions in loan agreements. However, such measures cannot provide legal guarantees that the objects will be protected.

There are also significant costs associated with legal and research requirements and cross negotiations with exhibition partners (e.g. NGV Melbourne if an exhibition is shared with them). Legislation would reduce costs (both in Te Papa staff time and considerable diplomatic, Ministry and Ministerial time) and make more objects available for loan, with considerable public value as a result. This includes both international works and Maori taonga held in overseas collections – bringing the best of the world to New Zealand, and bringing taonga home to reconnect with their source communities via museums such as Te Papa.
Through Te Papa’s international taonga research, we know that over 16,000 items are held in overseas institutions. Many are from the early contact period so are of high historical significance and are very rarely seen in New Zealand. Our relationships with international museums, both through exhibition exchanges such as E Tū Ake in Paris and Mexico City, as well as the Karanga Aotearoa repatriation programme grow every year. These relationships and the dialogue that takes part as a result, build strong networks and greater understanding of Māori culture and tikanga (custom) which may result in greater willingness to loan taonga to New Zealand. If introduced, this legislation would provide legal reassurance to institutions supporting the return of taonga, even if only temporarily.

In terms of the potential to bring more taonga to New Zealand, this legislation is about cultural identity and revitalisation, artistic reclamation and development. An example is puoro (Maori musical instruments). This art form has grown exponentially due to the access to and active research on puoro held in overseas museums. The importance of access to these objects for identity, cultural maintenance and revitalisation should be incorporated into the legislation. Te Papa hopes that this legislation can help to give comfort to lending institutions so they are more likely to lend taonga to New Zealand.

Issues

New Zealand’s lack of legislation is well known internationally, and this means that loan requests do not proceed beyond initial scoping, and do not reach the stage of being able to make a formal request. Issues Te Papa has had:

- We were not able to borrow works from the National Palace Museum of Taiwan once they found out we did not have legislation, due to their concern that China may make a claim. According to counterparts in the Ministry for Foreign Affairs and Trade, this museum has a policy of not lending to any museum outside Taiwan unless the country has passed IFS legislation. China has claimed in the past that the National Palace Museum's entire collection of treasures belongs to Beijing.

- Städel: Seven works were removed from the Städel exhibition at an early stage of negotiations due to perceived risk in absence of immunity from seizure laws. International exhibitions like this and the Monet exhibition bring the best of the world to New Zealand and provide economic benefits for Wellington.

- Huia feathers for the Tainui exhibition required a letter from the Minister for the Tainui exhibition. Despite clear provenance the Austrian Museum of Ethnology was concerned that there might be a claim on five sets of huia feathers and a wakahuia that belonged to prominent Tainui chiefs and gifted to Andreas Reischek, an Austrian scientist, during his visit to the King Country region of New Zealand in 1882. We understand that they were taken out of New Zealand by Reischek around 1889. This loan required significant diplomatic (Austrian and New Zealand), Ministry, Minister and Te Papa time to resolve. The feathers are a highlight of the Tainui iwi exhibition, still on at Te Papa.

- Oceania Exhibition – we had issues with loans from the British Museum. The British Museum is very cautious about making loans of indigenous material back to the source country – perhaps in part due to their experience with bark paintings in Australia. While digital repatriation is an option that is actively being explored, Te Papa would like to be able to show some of the 16,000 taonga held overseas in New Zealand. Some of the most significant and early contact taonga (for example from Cook’s Voyages) are held in overseas museums such as the British Museum.

- National Art Gallery of Australia requested a formal letter of comfort from the Ministry and Te Papa before they agreed to lend a kākahau (cloak) for the Kahu Ora: Living Cloaks exhibition.

- If Te Papa is to bring in a touring show to New Zealand and then tour it to Australia (also currently without IFS legislation), Te Papa’s risks go beyond New Zealand’s borders therefore legislation that covers the same issues as Australia’s would be useful.
Automatic immunity or immunity on application?

Q2: Should immunity from seizure apply automatically to objects on loan to New Zealand?

It should apply to objects on loan to approved institutions, and those who have temporary approved status. It should not automatically apply to all objects on loan to New Zealand. Automatic immunity is not as robust as there would be less due diligence on provenance and compliance with international standards.

Q3: Should institutions be required to apply for immunity for particular exhibitions or objects? If so, what information should be provided in such applications?

See below.

Q4: Should objects be covered by immunity if they are borrowed by institutions with ‘approved institution’ status? If so, what conditions should institutions be required to meet in order to become approved? What review and reporting requirements should be put in place?

Te Papa supports having ‘approved institutions’ rather than automatic immunity or case by case immunity. This could be achieved by a listing of approved museums, in a similar way to Section 16 of the Protected Objects Act. Meeting the ICOM definition of a museum indicates that museums are already operating to high ethical standards, for the public benefit, and will carry out due diligence as a matter of course. Institutions would need to prove that they had robust processes for carrying out due diligence and checking provenance.

The benefits of this approach would be that workloads would be reduced, whereas a case-by-case basis would entail considerable staff time, particularly if combined with obtaining government indemnity.

If institutions are approved, compliance should be auditable. Te Papa supports approval being for a fixed period and renewable, but notes that benefits will be significantly reduced if compliance and audit procedures are too frequent or unnecessarily detailed.

A tiered approach for major and small institutions might work well, as they would use it less often and probably for individual items rather than entire exhibitions. Alternatively, larger institutions could assist smaller ones with applications and advice. Te Papa would be very happy to provide advice to other organisations.

Loan purposes

Q5: What loan purposes should qualify for protection under IFS legislation? Should the legislation exclude objects imported for commercial purposes from its coverage? Should any other purposes be specifically excluded?

Commercial purposes needs more definition, but should be excluded.

Eligible borrowing institutions

Q6: What types of borrowing institutions or organisations should be eligible to benefit from immunity?

All New Zealand institutions that fit the International Council of Museums (ICOM) definition of a museum. Iwi cultural centres should be able to benefit, but if they did not meet the criteria, it is possible that Te Papa could assist with facilitating loans to iwi.

The American Museums Association enacted special loaning provisions so that First Nation treasures could be loaned back to tribal reservations as they recognised the need to loan these treasures back to their source communities for cultural revitalisation and identity.
Lenders

Q7: Should IFS legislation limit immunity to objects borrowed from certain types of lenders?

No.

Q8: What information or assurances, if any, should the legislation require lenders to provide?

Standard due diligence questions (for example, how the lender acquired the object, the object’s provenance, the lender’s authority to lend the object, any known claims by third parties concerning the object) should be requested.

These questions were asked of the Städel Museum and as a result they withdrew several objects from the exhibition list. IFS does not remove the obligation for institutions to carry out due diligence along with checking with Interpol, or the Art Loss Register (etc). The lending institution should provide relevant documentation concerning any item over which there is any doubtful provenance.

Publication and objection

Q9: Should IFS legislation require the borrowing institution to publish information about objects for which the institution is seeking immunity?

It could do, but private lenders’ desire to remain anonymous needs to be respected. The owner may wish to be anonymous for a number of reasons, for example, security concerns. Obtaining image permissions can often be difficult. Sometimes contractual or marketing reasons mean we do not want or are not able to make an exhibition public before a certain date. Therefore we recommend that these not be compulsory.

Q10: If so, should a publication requirement be accompanied by provision for an objection period, during which potential claimants may object to the granting of immunity before the immunity is granted?

In practice this could be difficult, as a claim could still be made beyond the objection period.

Q11: What information, if any, should borrowing institutions be required to publish? What provision should the legislation make for the withholding of information in particular cases?

As noted above in response to Q9, confidentiality could be an issue and needs to be respected. A description of the work could be published, which would be sufficient for someone to recognise the work. It may be useful for the Ministry to publish a list of items on its website instead of or as well as the borrowing institution, to provide more transparency.

Types of claims protected against

Q12: What types of legal claims and proceedings should the legislation provide immunity against?

Limiting judicial seizure of cultural material is in the best interest of museums to ensure the physical well-being of artefacts, and to avoid implication in a dispute between two other parties. It does not however limit the impact of a third party suing a museum for damages or conversion. While there is no international precedent for this type of comprehensive legislation it would give museums protection from potentially crippling legal disputes and also provide institutions with a significant advantage in the highly competitive international lending environment.

Protected objects

Q13: Should protected New Zealand objects, as defined in the Protected Objects Act 1975, be excluded from immunity protection under IFS legislation?

This needs to be carefully considered to ensure that legitimate claims from iwi are not prevented.
Q14: How should IFS legislation be made compatible with New Zealand’s current obligations under international conventions?

Legislative changes should be undertaken to ensure that it is compatible with international conventions such as UNIDROIT Convention on Stolen or Illegally Exported Objects, as well as the Mataatua Declaration on the Rights of Indigenous Peoples.

We understand that this legislation may be able to fill some gaps with international legislation – for example, the UNIDROIT Convention on Stolen or Illegally Exported Objects may not apply to stolen objects unless it happened after 2006 and within 50 years of the theft, which limits its usefulness, particularly with regard to objects stolen between 1933-1945 (World War Two Nazi period).

Taonga Māori

Q15: Should taonga Māori be excluded from immunity protection under IFS legislation? Should IFS legislation make any other special provision for objects of particular significance to Māori?

No.

Te Papa always consults with iwi before making a loan where provenance is known, and supports this being a requirement for all borrowing institutions.

Waitangi Tribunal decisions would need to be taken into consideration, as Wai262 and other Waitangi cases affirm the importance of taonga to Māori. The return of taonga from overseas may be negotiated through the Treaty Settlement process.

Q16: Should human remains be excluded from immunity under IFS legislation?

Yes. This also raises the issue of funerary objects as there is a growing trend to have these returned as well.

Periods of occupation and dispossession

Q17: Should IFS legislation make any special provision for objects whose provenance is uncertain or disputed as a result of particular periods of war, occupation, colonisation or nationalisation?

The danger of specifying certain periods is that it may exclude others that are valid. It would be better to rely on documentation for each loan as set out in question 8 and 19.

Other issues

Q18: Do you have any other comments about possible IFS legislation?

The critical issue that the legislation needs to address is why taonga might be lent back to New Zealand – to reconnect with their source communities via museums such as Te Papa. The importance of access to these objects for identity, cultural maintenance and revitalisation should be incorporated into the legislation. Museum ethics and standards as set out by ICOM, UNESCO, and the Mataatua Declaration of the Rights of Indigenous Peoples affirm the importance of taonga to their source communities for revitalisation and development of culture. Internationally, museum best practice recognises the important relationship between taonga and their descendant kin communities. There is willingness to lend, and an appreciation of the benefits of engaging with source communities, and Te Papa hopes that this legislation can help to give comfort to lending institutions so they are more likely to lend taonga to New Zealand.

Q19: If your submission is made on behalf of a borrowing institution, please briefly describe:

- your current practice when borrowing objects from overseas, in relation to investigating matters such as the object’s provenance, the lender’s ownership of the object, and any claims on the object
• any cases in which overseas lenders sought assurances of immunity from seizure, and how your institution responded to such requests
• any cases in which legal claims on borrowed objects were made or threatened.

Note: please take care to indicate if any of this information is confidential or sensitive (see ‘Publication of submissions’ at the start of this paper).

Current practice
Te Papa carries out due diligence when making loans from elsewhere to ascertain if there are any issues with provenance, ownership or potential claims.
Due diligence at Te Papa includes the following steps:
a) Ascertaining that export from the country of origin was legal
b) Establishing provenance as far as possible
c) Examination of the item for evidence of age/use
d) Consideration of type of item and likely origin
e) Evaluation of the information given by the source and questioning inconsistencies and gaps
f) Checking published and unpublished sources of missing/stolen/illegally exported items e.g. Art Loss Register; Interpol.

Assurance of immunity from seizure sought or claims made
Examples where this has been sought are described in the response to question 1.
There have been no cases where legal claims were made or threatened, but Te Papa’s processes seek to ensure that any ethical issues are identified prior to display. Maintaining high ethical standards is core business for museums, and is a reputational issue that is taken very seriously by staff.